(2)

Supreme Court U.S.
FILED
MAY 10 1996
CLERK

No. 95-1622

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

B.J. GURLEY, doing business as
MOLTAN COMPANY, a sole proprietorship,
Petitioner,

v.

ROBERT SWAIM,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF IN OPPOSITION

BARRY A. MACEY
MACEY, MACEY AND SWANSON
445 North Pennsylvania Street
Suite 401
Indianapolis, Indiana 46204-1800
(317) 637-2345
Counsel for Respondent

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

18 pp

QUESTIONS PRESENTED

1. Did the Court of Appeals err in ruling that the district court did not abuse its discretion by refusing to set aside the default judgment in this case where the court found that it had personal jurisdiction over defendant based on the plaintiff's substantial compliance with Indiana Trial Rules for service of process by personal service on the secretary to defendant's CEO and by service on the Indiana Secretary of State as defendant's legal agent?

2. Did the entry of a default judgment against the defendant violate due process where the Court below found that defendant had been properly served under Indiana Trial Rules governing service of process and that defendant's failure to timely respond to plaintiff's complaint was not for good cause?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	5
I. THE SEVENTH CIRCUIT'S INTERPRETATION OF INDIANA TRIAL RULES AND APPLICATION OF THE RULES TO THE FACTS OF THIS CASE DO NOT PRESENT AN IMPORTANT QUESTION OF FEDERAL LAW	5
II. THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH ANY DECISION OF THE SUPREME COURT OR OF ANY FEDERAL COURT OF APPEALS	9
III. THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH ANY DECISION OF THE INDIANA SUPREME COURT	12
CONCLUSION	13

TABLE OF AUTHORITIES

Cases Page

Baker v. Sihsmann, 315 N.E. 2d 386 (Ind. App. 1974) 7
Buck v. P.J.T., 394 N.E. 2d 935 (Ind. App. 1979) 7
Glennar Mercury-Lincoln, Inc. v. Riley, 338 N.E. 2d 670 (Ind. App. 1975) 6
LaPalme v. Romero, 621 N.E. 2d 1102 (Ind. 1993) 12
Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652 (1950) 7, 8
New York National Organization of Women v. Terry, 961 F.2d 390 (2d Cir. 1992), *cert. granted, vacated, Pearson v. Planned Parenthood Margaret Sanger Clinic*, 507 U.S. 901, 113 S.Ct. 1233, 122L.Ed.2d640 (1993), *on remand, judg. reinstated*, 996 F.2d 1351 (2d Cir. 1994), *cert. granted, vacated*, —— U.S. ——, 114 S.Ct. 2776, 129 L.Ed.2d 888, *on remand*, 41 F.3d 794 (2d Cir. 1994) 10, 11
Omni Capital International v. Rudolf Wolff & Co., 484 U.S. 97, 108 S.Ct. 404, 98 L.Ed.2d 415 (1987) 9, 10
Overhauser v. Fowler, 549 N.E. 2d 71 (Ind. App. 1990) 6
Precision Erecting, Inc. v. Workurka, 638 N.E. 2d 472 (Ind. App. 1994) 7
S.J. Groves & Sons Co. v. J.A. Montgomery, Inc., 866 F.2d 101 (4th Cir. 1989) 7
Spangler v. State, 607 N.E. 2d 720 (Ind. 1993) 6

Statutes

Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* 2
26 U.S.C. § 626(d) 2

Other Authorities

Federal Rules of Civil Procedure 4(e) 5
Federal Rules of Civil Procedure 12(h) 9
Federal Rules of Civil Procedure 55(a) 4
Federal Rules of Civil Procedure 83(2) 5

TABLE OF AUTHORITIES—Continued

	Page
Indiana Trial Rule 4.1(A) (1) and (2)	2, 3
Indiana Trial Rule 4.4(B) (2)	2, 12
Indiana Trial Rule 4.6(A) (1)	3
Indiana Trial Rule 4.10	3, 12
Indiana Trial Rule 4.15(F)	6, 10, 12
Indiana Trial Rule 4.16(A)	5, 10, 12
Supreme Court Rule 10	11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1622

B.J. GURLEY, doing business as
MOLTAN COMPANY, a sole proprietorship,
Petitioner,

v.

ROBERT SWAIM,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Plaintiff Robert Swaim was employed as a regional sales manager by Moltan Company.[1] (R. 12, Att. ¶ 2) In January, 1992, he was relocated to Indianapolis, Indiana, where he assumed responsibility for a reorganized sales territory in Indiana and adjacent states. (*Id.*, ¶ 3) On August 14, 1992, he was terminated from his employ-

---

[1] References to the record are to the Document Nos. in the Record prepared for the Court of Appeals. Where appropriate, references to Attachments ("Att"), page nos. ("at ——") and paragraph nos. ("¶ ——") within each record document are indicated.

ment by Moltan. (*Id.*, ¶ 4) Swaim was sixty years old when he was terminated. (*Id.*, ¶ 1)

On December 23, 1992, Swaim filed a charge of age discrimination against Moltan Company with the Equal Employment Opportunity Commission in Indianapolis. (R. 1, Ex. A) A response to the charge was filed on behalf of Moltan Company by its Controller. (R. 10, Ex. A) After the charge had been pending for more than sixty days, Swaim advised the EEOC of his intention to file suit pursuant to 29 U.S.C. § 626(d). (R. 26, Ex. C)

Swaim filed his complaint against Moltan Company on June 7, 1993, for violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* (R. 1) Upon telephone inquiry to the headquarters of Moltan Company in Memphis, Tennessee, counsel for Swaim was informed that B. J. Gurley was the Chief Executive Officer of Moltan Company for service of process on Moltan. (R. 12, Att. ¶ 1-2) Counsel then mailed a summons and copy of the complaint to B. J. Gurley, Moltan Company, 3555 Moltan Drive, Memphis, TN 38115. (App. 29)[2] The address is the correct address for Moltan Company, and B. J. Gurley is the Chief Executive Officer for Moltan Company. (App. 48) The envelope contained the name of Swaim's Indianapolis attorneys in the return address. (App. 29) When the post office attempted delivery, no one at Moltan Company would sign for the letter or except delivery. The envelope was returned to plaintiff's counsel by the postal service marked "unclaimed." (App. 24, 29) Following the defendant's failure to accept service through certified mail under Indiana Trial Rule 4.1(A)(1), the plaintiff served the defendant under two alternative provisions for service of process under the Indiana rules.

First, an alias summons and complaint were forwarded to Mid-South Subpoena Service in Memphis for personal

---

[2] References to Documents contained in Petitioner's Appendix to its Petition are designated ("App. ——").

service on Moltan through its Chief Executive Officer under Indiana Trial Rule 4.1(A)(2) and 4.6(A)(1). (App. 24-25) On two consecutive days, August 10-11, 1993, the process server appeared at the Moltan office of B. J. Gurley and attempted to effect personal service. On both occasions, Jean Black, Ms. Gurley's personal secretary, informed the process server that Ms. Gurley was not present. (App. 53)

Jean Black acknowledged that she is the Moltan employee assigned responsibility for business matters involving B. J. Gurley. (App. 54) Acocrding to Ms. Black, she was authorized to receive first class mail for Ms. Gurley and Moltan, but she did not have authority to accept legal papers for B. J. Gurley individually. (*Id.*) In the affidavit supplied to the Court, Jean Black did not deny that she was authorized to receive certified mail or legal papers on behalf of Ms. Gurley in her official capacity or on behalf of Moltan. (*Id.*)

On the second day of attempted personal service on Moltan through B. J. Gurley, the process server served Jean Black for Moltan Company and B. J. Gurley, by leaving a copy of the summons and complaint at Ms. Black's feet. (App. 30) The documents were subsequently mailed back to the process server by Ms. Black. (App. 54)

The plaintiff then effected service under Indiana Trial Rule 4.4(B)(2) and 4.10 through service on the Indiana Secretary of State as agent for service of process of all persons or organizations doing business in the State of Indiana. (R. 7, 9) On September 3, 1993, the district court issued an alias summons addressed to Moltan Company, c/o Joe Hogsett, Secretary of State, Indianapolis, Indiana. (R. 9) The summons and complaint were mailed by certified mail return receipt requested by the Secretary of State to Moltan Company at its correct address in Memphis on September 14, 1993. The mailing was returned to the Office of the Secretary of State

marked "unclaimed." (App. 25-26) On October 20, 1993, the Secretary of State filed in the district court an Affidavit of Service by the Secretary of State. (R. 9)

Moltan Company did not appear in the district court to respond to the summons and complaint. On December 28, 1993, plaintiff filed a request for entry of default under Federal Rule 55(a). (App. 21) A copy of the request for entry of default was served on B. J. Gurley, Moltan Company, at Moltan's Memphis address. (App. 22) The Clerk of Court entered the default on December 29, 1993; the entry was also served on the Moltan headquarters. (App. 37)

On January 12, 1994, plaintiff moved for entry of a default judgment under Federal Rule 55(b)(2), with supporting affidavits establishing service, damages and fees. (App. 38) On January 18, 1994, the Court entered Judgment in the amount of $197,733.04 as damages and $4681.75 as fees and costs. (App. 43) A copy of the Judgment was forwarded to B. J. Gurley at Moltan Company in Memphis. (App. 44)

Moltan Company appeared by its attorney on January 28, 1994, and moved to set aside the entry of default and judgment and for leave to file a tendered answer to the complaint. (App. 45) On November 11, 1994, the district court entered an Order denying Moltan's motions. (App. 65) The district court found that the defendant had been properly served under the Indiana Trial Rules and that no circumstance warranting relief from the default judgment had been established. (App. 66) The district court was affirmed by the Seventh Circuit Court of Appeals in a written opinion on January 8, 1996. (App. 1)

REASONS FOR DENYING THE WRIT

I. THE SEVENTH CIRCUIT'S INTERPRETATION OF INDIANA TRIAL RULES AND APPLICATION OF THE RULES TO THE FACTS OF THIS CASE DO NOT PRESENT AN IMPORTANT QUESTION OF FEDERAL LAW

Rule 4(e) of the Federal Rules of Civil Procedure provides that service of a complaint filed in the federal district courts may be effected under state law procedures applicable to service within the state where the federal court is located. As authorized by Rule 4(e), plaintiff in this case elected to accomplish service of the summons and complaint on the defendant under the provisions of the Indiana Trial Rules. Both the district court and the Court of Appeals found that defendant here was in fact served with process in compliance with the Indiana rules.

The district court concluded in its Entry Discussing Defendant's Motion to Vacate Default Judgment:

> Because Moltan evaded service of process in violation of its duties pursuant to Rule 4.16 and because Plaintiff substantially complied with service requirements under the trial rules, service of process was adequate to provide Defendant with notice of the lawsuit and to confer jurisdiction for the default judgment.

(App. 75) The district court found as a finding of fact that Jean Black, in her capacity as secretary to B. J. Gurley, had authority to accept service of process on behalf of her employer.[3] (App. 72) Given this authority, the court concluded that her refusal to accept service on the defendant's behalf violated Indiana Trial Rule 4.16 (A) which provides:

---

[3] *See also* rule 83(2), Federal Rules of Civil Procedure ("Executive Officer" for purpose of service of process on an organization includes the personal secretary of the president or presiding officer).

> It shall be the duty of every person being served under these rules to cooperate, accept service, comply with the provisions of these rules, and, when service is made upon him personally, acknowledge receipt of the papers in writing over his signature.
>
> * * * *
>
> (2) A person who has refused to accept the offer or tender of the papers being served thereafter may not challenge the service of those papers.

The district court also relied on the language of Indiana Trial Rule 4.15(F), which provides:

> No summons or the service thereof shall be set aside or be adjudged insufficient when either is reasonably calculated to inform the person to be served that an action has been instituted against him, the name of the court and the time within which he is required to respond.

(App. 73) *See Spangler v. State*, 607 N.E. 2d 720, 725 (Ind. 1993) (refusal of tendered service does not defeat court's jurisdiction because person to be served is on notice of pendency of court proceedings even if refusal precludes knowledge of particular proceedings).

In accord with decisions of the Indiana courts, the district court applied Rule 4.15(F) to cure technical defects in service of process, but not to cure a total failure of service. *Compare Overhauser v. Fowler*, 549 N.E.2d 71, 73 (Ind. App. 1990) with *Glennar Mercury-Lincoln, Inc. v. Riley*, 338 N.E.2d 670 (Ind. App. 1975). The district court further concluded that any defects in service asserted by the defendant and supported by the record in this case were technical in nature. Accordingly, the court found that the defendant had been served in this case in compliance with the Indiana Rules.

The Court of Appeals agreed with both the district court's factual findings and with its application of the Indiana Trial Rules. The Court concluded that the pro-

visions of the Indiana Trial Rules which provide an objective standard for service of process are consistent with the requirements of due process. *See Muliane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315, 70 S.Ct. 652 (1950) ("the reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected"). Under this standard, the Court of Appeals affirmed the district court's conclusions that the plaintiff's service of process through personal service on the secretary to the Chief Executive Officer of Moltan and through service on the Secretary of State as statutory agent for service of process under the Indiana Rules was in substantial compliance with the letter and spirit of the Indiana Rules and satisfied the due process requirement that it be reasonably certain to inform the defendant of the pending action.[4]

Petitioner's statement of the questions presented for review ignores completely the factual finding that plaintiff accomplished service of process on the defendant under the Indiana Trial Rules. Thus, in its first question presented, the petitioner asserts that the court below refused to set aside the default judgment "notwithstanding Mr. Swaim's failure to comply with Indiana state law prerequisites for personal service of process." In its second question presented, petitioner asserts that the court denied it due process by failing to set aside the default judgment when it made "a timely attempt to have a case decided

---

[4] Under Indiana law, the Secretary of State is treated as a true agent for service of process. *Baker v. Sihsmann*, 315 N.E. 2d 386 (Ind. App. 1974). Service on a registered agent is complete service even if no actual delivery to the defendant occurs. *Precision Erecting, Inc. v. Workurka*, 638 N.E. 2d 472 (Ind. App. 1994). *Buck v. P.J.T.*, 394 N.E. 2d 935, 937 (Ind. App. 1979). *See also S.J. Groves & Sons Co. v. J.A. Montgomery, Inc.*, 866 F.2d 101 (4th Cir. 1989) (Service on Secretary of State is valid service on defendant).

on its merits, as opposed to an attempt to totally avoid the jurisdiction of the Court." Contrary to the petitioner's representations, the Court found, based on all the evidence before it, that the defendant had been served in compliance with Indiana law. The Court also found, contrary to petitioner's assertion, that this defendant had not filed a timely response to plaintiff's complaint and that its actions supported a finding that it was actively seeking to avoid the jurisdiction of the federal court.

The petition in this case simply does not raise any important issue of federal law. The Court of Appeals decision involves an interpretation of the Indiana Trial Rules. Plaintiff does not assert in its petition that the Indiana Trial Rules violate the due process clause of the Constitution. In fact, as the Court of Appeals recognized in its decision, the Indiana Trial Rules codify the standard for due process with respect to service of process announced by the Supreme Court in *Mullane*. Moreover, the decision below is based on factual determinations concerning the actual authority of individuals within the Moltan operation to accept service of process on behalf of the entity. These factual findings are supported by the record. Even if they were not supported, it is not the province of the Supreme Court to correct erroneous factual findings of the district court.[5]

---

[5] The petitioner in this case styles itself as "B. J. Gurley, d/b/a Moltan Company, a sole proprietorship." The complaint below was filed against Moltan Company as an entity. In responding to EEOC charges and in contesting the entry of default in the district court, the defendant never presented any evidence that it was anything other than a corporate entity. On appeal, Moltan introduced for the first time affidavits and documents to support its claim that it is a sole proprietorship capable of being sued and served in the name of its sole proprietor, B. J. Gurley, only. The Court of Appeals ruled that this argument had been forfeited by Moltan's failure to raise it in its Rule 60(b) motion before the district court. The petitioner does not contest this portion of the Court of Appeals decision. The Plaintiff asserted before the Court of Ap-

The decision of the Court of Appeals does not implicate any important issue warranting Supreme Court review. Accordingly, the petition for a writ of certiorari in this case should be denied.

II. THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH ANY DECISION OF THE SUPREME COURT OR OF ANY FEDERAL COURT OF APPEALS

Petitioner cites only two decisions of the Supreme Court in support of its claim that the decision of the Court of Appeals is in conflict with a decision of the Supreme Court. Neither decision relates to the issue decided by the Seventh Circuit in this case.

The petitioner first relies on *Omni Capital International v. Rudolf Wolff & Co.*, 484 U.S. 97, 108 S.Ct. 404, 98 L.Ed 2d 415 (1987). In that case, the Court held that a federal court could not acquire personal jurisdiction over a defendant absent authorization in federal law or under a state statute or rule for service of process on that defendant. 484 U.S. at 104. Where authorization was not found, a federal court was not permitted to fill in

---

peals that the defendant's failure to raise its entity status as an issue in the district court also precluded its assertion on appeal that service on Moltan as an organization under the Indiana Rules was insufficient because Moltan is a sole proprietorship. The Court of Appeals did not address this argument with respect to the service of process issue, finding that the Indiana Rules permitted service on either B. J. Gurley, as sole proprietor, or on Moltan Company, as a separate entity, in the manner pursued by plaintiff in this case. The Court of Appeals is supported in this ruling by the Indiana decisions cited in its opinion. (App. 14-15) The Court of Appeals decision is also supported on the alternative ground that Moltan failed to raise this argument in the district court. While Moltan asserted below that the challenge to service of process relates to jurisdiction and thus can be raised at any time, it is clear, to the contrary, that challenges to service of process and to personal jurisdiction can be waived if not timely raised. See Rule 12(h), Federal Rules of Civil Procedure.

"the interstices of the law" by devising its own rule for service of process in particular litigation. *Id.* at 108.

The Seventh Circuit cited and followed the decision in *Omni Capital* in this case. The decision below expressly stated, in reliance on *Omni Capital,*

> The federal courts are strictly bound in such cases by the letter of state law and are without authority to fill whatever interstitial gaps a given case may illuminate.

(App. 14) Applying this rule, the Court concurred with the district court's finding that the defendant was properly served with process under the Indiana Trial Rules. Both the district court and the Court of Appeals relied on specific provisions of Indiana Trial Rule 4.15 and 4.16 to support their conclusion that, under all the circumstances, the plaintiff had satisfied the requirements of the Indiana rules through effective personal service and through service on the Indiana Secretary of State as statutory agent for service of process. (App. 17, 76)

The second decision cited by the Petitioner is *New York National Organization of Women v. Terry,* 961 F.2d 390 (2d Cir. 1992), *cert. granted, vacated, Pearson v. Planned Parenthood Margaret Sanger Clinic,* 507 U.S. 901, 113 S.Ct. 1233, 122 L.Ed.2d 640 (1993); *on remand, judg. reinstated* 996 F.2d 1351 (2d Cir. 1994); *cert. granted, vacated,* —— U.S. ——, 114 S.Ct. 2776, 129 L.Ed.2d 888, *on remand* 41 F.3d 794 (2d Cir. 1994). While Petitioner purports to cite at length, and without volume or page citation, the purported holding in this case, the only Supreme Court actions included in Petitioner's citation of the case are two memorandum entries granting *certiorari* and remanding the case to the Court of Appeals for reconsideration in light of recent decisions in other cases. Moreover, the only proposition for which petitioner cites the case is the same proposition announced in *Omni Capital,* that federal courts relying on service re-

quirements under state law must assure that state law requirements have been met. The Court of Appeals below both cited and followed this holding. (App. 13-14) Thus, petitioner's reliance on the *New York NOW* case is both unfounded and misleading.

Petitioner also cites the lower court decision in *New York NOW, supra,* and two other circuit court decisions, for the proposition that, when service is effected under state law pursuant to Rule 4(e) of the Federal Rules of Civil Procedure, "federal courts have no authority to stray from the requirements of state law." *Petition,* at 12. In relying on these cases, petitioner again ignores the finding of both the district court and the Court of Appeals that the requirements for service of process under the Indiana Trial Rules were satisfied.

Petitioner cannot in good faith contend that the Court below did not follow the dictates of the Supreme Court or of other federal courts on the requirements for service of process. Petitioner's real argument is that the Court below was wrong in its application of the established law to the facts of record. This argument is insufficient to support the petition for a writ of certiorari in this case. It is not the province of the Supreme Court to correct erroneous decisions in the courts below. As Supreme Court Rule 10 states:

> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

The petition in this case presents nothing more than an assertion of error in the application of an established rule of law to the particular facts of this case. For this reason, the petition should be denied.

III. THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH ANY DECISION OF THE INDIANA SUPREME COURT

Petitioner cites only one decision of the Indiana Supreme Court in support of its assertion that the decision below is in conflict with the decision of a state court of last resort. In *LaPalme v. Romero*, 621 N.E.2d 1102 (Ind. 1993), the Indiana Supreme Court held that personal service on an individual by service on the manager at his place of employment is not authorized service under Indiana Trial Rule 4.1 and that complete failure of service of this kind is not a technical defect curable under Indiana Trial Rule 4.15. The Court of Appeals decision in this case is not in conflict with the *LaPalme* decision.

Although the Court of Apeals cited *LaPalme* for the general applicability of the Indiana Trial Rules, it was not required to address the issue decided in *LaPalme* because it found, in agreement with the district court, that service had been accomplished in accordance with the Indiana Trial Rules. Specifically, the Court found that personal service on Jean Black was sufficient under the rule "because she had authority to accept B. J. Gurley's official mail and . . . her refusal to do so was a breach of the duty mandated by Trial Rule 4.16." (App. 17) The Court also concluded that service on the Secretary of State complied with the requirements of Rules 4.4(B)(2) and 4.10. (*Id.*)

Unlike *LaPalme*, there was no failure of service by plaintiff in this case. Instead, there was a willful and unwarranted refusal by the defendant to accept proper service. (App. 18) Accordingly, the decision of the Court of Appeals is not in conflict with any decision of the Supreme Court of Indiana. Moreover, even if the Court of Appeals misapplied the standards for interpreting the Indiana Trial Rules, the error is one of application of established rules to specific facts. Even if such an error were present,

it would not warrant grant of the petition for *certiorari* in in this case.

CONCLUSION

For the foregoing reasons the Petition for a Writ of Certiorari to the Court of Appeals for the Seventh Circuit should be denied.

Respectfully submitted,

BARRY A. MACEY
MACEY, MACEY AND SWANSON
445 North Pennsylvania Street
Suite 401
Indianapolis, Indiana 46204-1800
(317) 637-2345
Counsel for Respondent